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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 971

JOSEPH BEN JACKSON, JR.,

Petitioner,

—v.—

JOSEPH F. FILLIBEN, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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IN THE

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OCTOBER TERM, 1968

No. ——

JOSEPH BEN JACKSON, JR.,

Petitioner,

—v.—

JOSEPH F. FILLIBEN, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Delaware entered on October 28, 1968.

Citation to Opinion Below

The opinion of the Supreme Court of the State of Delaware is reported at 247 A.2d 913, and is set out in Appendix A hereto, pp. 1a-3a, *infra*.

Jurisdiction

The judgment of the Supreme Court of the State of Delaware was entered on October 28, 1968. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and here the deprivation of rights secured by the Constitution and statutes of the United States.

Questions Presented

Petitioner made a report to the F.B.I. and the Police Commissioner (Respondent police sergeant's highest superior) that Respondent had committed acts constituting, in Petitioner's opinion, police brutality, thus depriving him of his rights under the Constitution and laws of the United States. Solely on the basis of this report, Respondent sued Petitioner for defamation.

1. Is the report absolutely privileged under the Constitution and laws of the United States?
2. Is the report privileged, absent any showing of malice, under the Constitution and laws of the United States?

Constitutional and Statutory Provisions Involved

This case involves the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

This case also involves 18 U.S.C. §§241, 242, and 42 U.S.C. §§1983, 1985, which are fully set out in Appendix B at pp. 4a-6a, *infra*.

Statement

Respondent, Joseph F. Filliben, Jr., filed a complaint in the Superior Court of the State of Delaware on July 26, 1966, alleging that Petitioner, Joseph Ben Jackson, Jr., made false charges of police brutality against Respondent to the U.S. Attorney at Wilmington, Delaware. (Complaint, para. 7). Petitioner moved in his answer, Sept. 16, for a dismissal of the complaint on the ground that any statements he may have made were privileged. He subsequently moved for judgment on the pleadings on the grounds that he had an absolute privilege to report viola-

tions of federal law to the appropriate federal official; and, alternatively, that malice could not be shown and therefore, under the doctrine of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), he could not be subjected to liability for his statement regarding Respondent. This motion was denied by order, without opinion, May 18, 1967.

At trial Respondent introduced evidence that Petitioner had sent a letter (P. Ex. #1; App. C, pp. 8a-13a, *infra*) to the Police Commissioner, Respondent's highest superior, and that a copy of this letter had been received by the F.B.I. The letter states that in accordance with the Commissioner's instructions, petitioner was submitting the letter "as an official complaint of abuse by Police." (App. p. 8a, *infra*).

The letter describes incidents which arose out of petitioner's arrest by Respondent Filliben, a police sergeant, the night of December 2, 1965. Briefly it states that Petitioner had been driving to work the night of December 2 when he was stopped by Sergeant Filliben who ordered him out of the car, grabbed him when he did get out and held him while another officer handcuffed his hands behind his back, "causing unbearable pain." "I was then thrown to the ground. I tried to get up several times but each time I was knocked back down. Sergeant Filliben then told one of the officers to hold me down and he immediately complied by dropping down upon me with his knee." (App. pp. 9a-10a, *infra*). While on the ground Petitioner asked the officer holding him to loosen the handcuffs because they were hurting him, but was told to shut up. Subsequently, the letter goes on, the patrol wagon came, and when Petitioner objected to getting into it Sergeant Filliben "grabbed me and slammed me back down on the ground." (App. p. 10a, *infra*). Petitioner again asked to have his handcuffs loosened. He was put in the wagon and taken, eventually, to the station.

> All during the ride I was begging and pleading for relief of the pain on my wrist. . . . After I was taken into the station the officer who had told me [in the patrol wagon] that he didn't have a key to fit the handcuffs on my wrists, selected one from a bunch of keys in his possession and caused me to bend over with my head almost between my knees. He then unlocked the handcuffs. My wrists were terribly bruised. . . . (App. pp. 10a-11a, *infra*).

The letter goes on to describe repeated demands by Sergeant Filliben as to whether Petitioner was going to have the case continued, and to relate a conversation containing the only mention of "police brutality" in the letter.

> [At the station] I started to make a third call to borrow money to get my automobile that was left at the scene with the motor running and lights on because the Sgt. told me that it would be impounded but was told to hang up. Sgt. Filliben then asked me again if I was going to have the case continued? I said to him "I really don't know. I have often read and heard of police brutality but had no idea that I would ever experience it." Sgt. Filliben then said, "you're lucky. Ten years ago I would have black jacked you." . . . I said, "With hand cuffs on?" He said, "That's right boy you're lucky." . . .
>
> . . . The next morning while sitting on a bench in the hall of the Public Building reading a newspaper at about 8:40 A.M., Sgt. Filliben approached me and said, "Ben are you going to have this case continued?" I said nothing. He repeated the question and I did not answer him. He then said, "All right boy, I just gave you your last chance" as though to threaten me. (App. pp. 11a-12a, *infra*).

At trial Respondent introduced evidence which, considered most favorably for Respondent, basically differed from the account given in Petitioner's letter only in alleging certain provocative acts by Petitioner at the time of his arrest, and in alleging that Petitioner had fallen rather than been thrown to the ground.[1]

At the close of Respondent's case, which included testimony by Petitioner, the latter moved for a directed verdict which was granted on the ground that Respondent had failed to prove that the charge of police brutality was made to the U.S. Attorney, as alleged in the complaint.

On appeal to the Supreme Court of the State of Delaware, Petitioner argued that the judgment below should be affirmed on the ground, among others, that Petitioner could not be held liable in defamation on the evidence presented consistently with the First Amendment and the doctrine announced in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). The Court found that the evidence showed a publication of the charge of "police brutality" to the Police Commissioner, Respondent's highest superior, and to the F.B.I., and therefore, since the variance between the complaint and the pleadings consisted solely in the identity

[1] Respondent's evidence indicated that while driving from work in uniform but in his own car he had noticed Petitioner speeding, and had pursued and stopped Petitioner with the aid of other officers. Petitioner had initially refused to get out of his car, and had eventually emerged cursing and waving his arms about, at which point he was grabbed and handcuffed. Respondent's evidence indicated that Petitioner had then fallen to the ground and that, because of his efforts to kick, Respondent ordered an officer to hold him down. Petitioner was later carried to the wagon, dropped to the ground when he kicked, and eventually placed in it. (See Tr. 12, 14, 15, 19, 51, 52, 54.)

The evidence also indicated that Respondent Filliben subsequently charged Petitioner with speeding, failing to stop at the command of a police officer, disorderly conduct and resisting arrest, and that after a hearing on all of these charges, Petitioner was convicted only of disorderly conduct (Tr. 40-44). Respondent's witnesses never denied that Sergeant Filliben had in fact grabbed

of the persons to whom the charges were made, direction of the verdict on this basis was unjustified. The Court further ruled that the charge of police brutality was not fatally vague, and finally that, assuming Respondent was a public official within the meaning of *Times* v. *Sullivan, supra*, the issue of malice was a matter for the jury.

Petitioner seeks review of this judgment on the basis that it is final within the meaning of 28 U.S.C. §1257. This Court had often said that the requirements of finality must be given a practical, not a technical construction. See, *e.g.*, *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949); *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379 (1953). It is Petitioner's contention, developed more fully, *infra*, pp. 8-14, that the allegedly defamatory utterance was protected under the Constitution and statutes of the United States, and particularly the First Amendment, and therefore that there is no issue for a jury in this case. The considerations of judicial economy central to 28 U.S.C. §1257 dictate that this case be finally disposed of now, rather than remanded for a new trial which would probably result in a verdict for Respondent,[2] another appeal, and another Petition for Certiorari. Further, denying Petitioner

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and held Petitioner while another officer handcuffed him or that Respondent had ordered another officer to hold Petitioner, whose hands were handcuffed behind his back, on the ground. Nor did Respondent's witnesses deny any of the other significant elements of the story outlined in Petitioner's letter, such as Petitioner's complaints regarding the tight handcuffs, the fact that these complaints were ignored, and Respondent's various intimidating and demeaning comments. Most significantly, Respondent never denied that the conversation in which Peitioner mentioned "police brutality"—and it is this reported conversation that was the basis of the libel action—took place as described in the letter.

[2] At any new trial Petitioner would have the heavy burden, under the law and particularly the test of malice established by the court below, of persuading a jury of the complete truth of the entire account of the incident outlined in the letter, in the face of testimony by four police officers, supported by one private citizen, in their refutation of a charge of police brutality.

relief now will finally deny him the essential right not to be forced to submit, in order to vindicate his right to speak, to further lengthy and expensive litigation with its inherent dangers of coerced settlement and its inevitable chill on First Amendment rights. See, *e.g.*, *Mills* v. *Alabama*, 384 U.S. 214, 221 (1966) (concurring opinion); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); and see *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963). *Cf. Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966); *Greenwood* v. *Peacock*, 384 U.S. 808, 829 (1966) (dictum) (dealing with 28 U.S.C. §2283).[3]

Reasons for Granting the Writ

Introduction

This case involves the right of a private citizen to report an alleged abuse by a police sergeant of rights protected by the Constitution and statutes of the United States to that officer's highest superior and to the F.B.I., authorities charged with responsibility for investigating and preventing such law violations. On a record which, considered most favorably for Respondent, fails to negate Petitioner's honest belief in the published charge of "police brutality," the Court below found that Petitioner could be held liable in defamation. In numerous cases concerning the exclusion of illegally obtained evidence this Court has pointed to the absence of significant deterrents to police abuse and has recognized the extraordinary difficulty that citizens have in proving a case of such abuse. See, *e.g.*, *Miranda* v. *Arizona*, 384 U.S. 436 (1966). To permit the police to

[3] The mere fact that it is conceivable that a new trial in this case *could* result in a judgment for Petitioner is not conclusive. See, *e.g.*, *Mills* v. *Alabama*, *supra*, 384 U.S. at 217, 221, 222 and n. 1; *cf. Dombrowski* v. *Pfister*, *supra*, 380 U.S. at 487; *Mercantile National Bank* v. *Langdeau*, *supra*, 371 U.S. at 573.

use defamation actions to punish any citizen who dares to complain to authorities whose responsibility it is to prevent such abuse is intolerable and inconsistent with the principles recently enunciated in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).

I.

Petitioner Cannot Be Held Liable in Defamation on the Basis of a Statement Alleging That Respondent Police Sergeant Had Violated Rights Protected Under the Constitution and Statutes of the United States, Published to Authorities Responsible for Investigating and Preventing Such Law Violations.

It is Petitioner's contention that he had an absolute privilege to report alleged police brutality to the Police Commissioner, Respondent's highest superior, and to the F.B.I., and therefore that there should be no judicial inquiry in a defamation suit into the truth of his allegation or into his motives in making it. To subject persons in Petitioner's position to defamation suits in which they must prove to a jury's satisfaction the truth[4] of any reports they have made would greatly increase the difficulty of enforcing the laws governing police conduct, and place an intolerable burden on First Amendment rights. See, *e.g.*, Note, 78 Yale L.J. 156, 163, 170 (1968). Moreover, where publication is only to authorities responsible for investigating such law violations, the accused has an opportunity to answer the charges in the course of any investigation and, unless the charges are found to be substantiated, his reputation should not suffer significantly.

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[4] In holding that a finding of malice could be made on this evidence the court in effect held that Petitioner could be held liable unless the allegations contained in his letter were in fact true.

An absolute privilege to report law violations to authorities responsible for investigating and prosecuting such violations has previouly been recognized by this Court. See, *e.g. In re Quarles*, 158 U.S. 532 (1895); *Vogel* v. *Gruaz*, 110 U.S. 311 (1884). But *cf. White* v. *Nicholls*, 3 How. 266, 44 U.S. 266 (1845); *Foltz* v. *Moore McCormack Lines, Inc.*, 189 F.2d 537 (2nd Cir.), *cert. denied*, 342 U.S. 871 (1951). Federal law clearly ought to govern any reports made to the F.B.I. *Cf. Thomas* v. *Loney*, 134 U.S. 372 (1890); *Foltz* v. *Moore McCormack Lines, Inc., supra.*[5] Similarly, federal law ought to govern reports of alleged violation of federal statutes—here 18 U.S.C. §§241, 242 and 42 U.S.C. §§1983, 1985[6]—and of the federal constitution—here the right not to be punished without due process of law—when these reports are made to persons responsible for seeing that such violations do not occur. (The Police Commissioner, as Petitioner's highest superior, is in a position to penalize any such law violations by providing for the discipline of the guilty officer.) Obviously it would be intolerable to allow a State to frustrate the implementation of federally protected rights by imposing its own restrictions on the ability of persons to seek redress for the violation of such rights. Therefore this Court could find Petitioner's letter protected by an absolute privilege simply as a matter of federal law.

But in addition, the right to report law violations free from the fear of defamation suits is, under these circumstances, of constitutional dimension. In *In re Quarles, supra,* this Court held that the right to inform a U.S.

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[5] Thus the U. S. Attorney in Delaware asserted his right in this case to refuse to disclose in the State court proceedings any information he had obtained from Petitioner. See Record in Superior Court Nos. 23, 24 and authorities cited, including *State of North Carolina* v. *Carr*, 386 F.2d 129 (4th Cir. 1967). See also *Touhy* v. *Ragen*, 340 U.S. 462 (1950).

[6] See generally *Pierson* v. *Ray*, 386 U.S. 547 (1967).

Marshall of a law violation was a right "secured by the Constitution of the United States," 158 U.S. at 537-538; and see *Bridges* v. *California,* 314 U.S. 252, 277 and n. 21 (1941). And in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), this Court looked to the common law of defamation in fashioning the limits imposed by the First Amendment on a state's ability to allow actions for defamation by public officials. An absolute privilege to speak free from any fear of liability in defamation has long been recognized at common law in a variety of circumstances, including judicial and quasi-judicial or administrative proceedings, and any necessary preliminaries to such proceedings. See generally PROSSER, TORTS §109 (1964); 1 HARPER & JAMES, TORTS §§5.22, 5.23 (1956); RESTATEMENT, TORTS §§585, 586, 587 (1938). *Cf. Pierson* v. *Ray,* 386 U.S. 547 (1967). And in many jurisdictions this absolute privilege has been specifically held to cover informal complaints of law violations made to police[7] or prosecutors. In addition to this Court's decisions in *In re Quarles and Vogel* v. *Gruaz, supra,* see, *e.g., Gabriel* v. *McMullin,* 127 Iowa 426, 103 N.W. 355 (1905); *Worthington* v. *Scribner,* 109 Mass. 487; *Wells* v. *Toogood,* 165 Mich. 677, 131 N.W. 124 (1911); *U.S.* v. *Moser,* 4 Wash. C.C. 726; *Hott* v. *Yarbrough,* 112 Tex. 179, 245 S.W. 676 (1922); *Burg* v. *Boas,* 231 F.2d 788 (9th Cir. 1956) (dictum); see generally RESTATEMENT, TORTS §587 (1938); PROSSER, TORTS §109 at 800 (1964). This Court

[7] The allegation of police brutality would of course, if true, constitute a violation not only of federal law but also of state laws, and it would therefore be appropriate to report such a violation to the Police Commissioner. But in any event, a report of *any* law violation to the Police Commissioner ought be absolutely privileged as a necessary preliminary to quasi-judicial disciplinary proceedings. *Cf. Sullivan* v. *Crisona,* 283 N.Y. Supp.2d 62 (1967) (absolute privilege covers Bar Association Grievance Committee proceedings).

should grant certiorari to determine whether a balancing of the interests involved does not, under the First Amendment and the principles enunciated in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), require an absolute privilege to report law violations to proper authorities.

II.

Petitioner Cannot Be Held Liable in Defamation on the Basis of a Report to Proper Authorities Regarding Alleged Violation by a Police Sergeant of Rights Protected Under the Constitution and Statutes of the United States Where the Record Shows No Malice Under the Standards Laid Down in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

Whether or not Petitioner's report is protected by an absolute privilege, as argued *supra,* pp. 8-11, it is at least protected by the qualified privilege outlined in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). The Court below based its decision on the assumption that Respondent police sergeant was a public official within the meaning of *Times* v. *Sullivan,* but purported not to decide that question. However, there should be no doubt that a defamation suit by a police sergeant, a person with "substantial responsibility for or control over the conduct of governmental affairs," whose qualifications and performance are of particular interest to the public (*Rosenblatt* v. *Baer,* 383 U.S. 75, 85, 86 (1966)), on the basis of a report accusing him of violating rights protected under the Constitution and laws of the United States, a matter of enormous and legitimate public interest, should be governed by the principles enunciated in *Times* v. *Sullivan.* See, *e.g., St. Amant* v. *Thompson,* 390 U.S. 727 (1968) (deputy sheriff); *Henry* v. *Collins,* 380 U.S. (1965) (chief

of police); *Pape* v. *Times,* 354 F.2d 558 (7th Cir. 1965) (deputy chief of detectives and police lieutenant); *Suchomel* v. *Suburban Life Newspapers, Inc.,* 84 Ill. App. 2d 239, 228 N.E.2d 172 (1967) (police sergeant); *Gilligan* v. *King,* 48 Misc.2d 212, 264 N.Y. Supp.2d 309 (1965) (police lieutenant); *Oswalt* v. *State-Record Co.,* 158 S.E.2d 204 (S.C. S.Ct. 1967) (police officer); see generally Bertelsman, *Libel and Public Men,* 52 A.B.A.J. 657, 661, 662 (1966).

Moreover, Petitioner's report would be protected at least by a qualified privilege under common law doctrines of greater importance, and more universally accepted, than that raised to constitutional dimensions in *Times* v. *Sullivan.* Thus it has long been held that no action in defamation will lie in the absence of malice for a complaint to proper authorities regarding the conduct of public employees. See, *e.g.,* PROSSER, TORTS §110 (1964); RESTATEMENT, TORTS §598 and comment (c) (1938); CASENOTE, 51 Colum. L.J. 244 (1951). And the right to report law violations to police or prosecutors has traditionally been protected if not by an absolute privilege, *supra,* p. 10, at least by a qualified privilege. See, *e.g., Swaaley* v. *United States,* 376 F.2d 857 (U.S. Ct. Claims 1967); *Annot.,* 140 A.L.R. 1466 (1942).

The court below held that the issue of malice was for the trier of fact But the question of whether, as a matter of law, malice can be found on this record, is one for this Court. See *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 285 and n. 26 (1964).

The allegedly defamatory charge at issue in this case is one of police brutality, an expression of Petitioner's opinion based on facts outlined in his letter. Since the claim of defamation was based only on this statement of opinion, and not on specific factual statements, it is arguable that no action for defamation lies at all. See *Garrison* v. *Louisiana,* 379 U.S. 64, 77 and n. 10 (1964). In

any event, a defense of fair comment must be afforded under *Times* v. *Sullivan* for an honest expression of opinion based upon privileged, as well as true, statements of fact, 376 U.S. at 292 n. 30. See generally Noel, *Defamation of Public Officers and Candidates,* 49 Colum. L.J. 875, 879 (1949). It was for Respondent to defeat this defense by a showing of malice—a showing that Petitioner's allegation of police brutality was unsupported except by statements of fact made with knowledge that they were false or with reckless disregard of whether they were false or not, *Times* v. *Sullivan,* 376 U.S. at 279-280. In fact, Petitioner's allegation was supported by numerous statements in his letter which were never even denied by Respondent: The allegations that he was held on the ground while handcuffed behind his back; that the handcuffs were excruciatingly tight and his continual pleas to loosen them ignored; and that Sergeant Filliben made numerous demeaning and intimidating comments. Moreover, Respondent Filliben introduced no evidence denying that the conversation relating to police brutality took place as described in the letter, which was admitted into evidence in full.[8] In that conversation Sergeant Filliben, when Petitioner implied that he had been subjected to police brutality, not only failed to deny, but implicitly acknowledged the truth of the allegation. (App. 12a, *infra*) Certainly these facts would alone support an honest belief[9] by Petitioner that he had been subjected to police brutality. Respondent's proof that certain of the facts reported in the letter were false seems therefore irrelevant.

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[8] See n. 1, pp. 5-6, *supra.*

[9] The fact that an opinion is unreasonable is immaterial. See, *e.g., New York Times* v. *Sullivan, supra,* 376 U.S. at 292, n. 30; Noel, *Defamation of Public Officers and Candidates,* 49 Colum. L.J. 875, 879 (1949).

Moreover, the insignificant discrepancies between Petitioner's and Respondent's versions[10] cannot constitutionally support a finding of malice. See *e.g.*, *Pickering* v. *Board of Educ.*, 291 U.S. 563 (1968); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 286, 289 (1964). It is inevitable that an event like this will produce somewhat different versions and interpretations of exactly what happened.[11] To allow a jury to find malice solely on the basis of such discrepancies as exist between Petitioner's story and the evidence Respondent introduced would be to subject virtually every person complaining of police abuse to the risk of damages and to place an intolerable burden on the rights of citizens to seek redress for legitimate grievances.

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[10] Respondent's witnesses testified that Petitioner acted provocatively at the time of his arrest—cursing and waving his arms—and after he was handcuffed—kicking at the officers. And Respondent's witnesses indicated that Petitioner fell or was dropped, rather than pushed, to the ground.

[11] Petitioner in this case was arrested for speeding at midnight, after a long day, on his way back to work; he testified that he was not driving fast and the evidence indicated that he was never convicted on the charges for speeding or for failing to heed an officer's signal; he was pursued and stopped by an officer driving in an ordinary car, and he testified that he did not know what was going on when he was asked to get out of his car. It is understandable, even accepting completely the version of the incident most favorable to Respondent's case, that Petitioner might feel that each assertion of police authority from the initial order to get out of his car on, was unwarranted, that he was justified in resisting such assertions and, therefore, that the entire incident represented an abuse by the police of his rights. In this context it is perfectly possible for him to have believed that he was pushed to the ground even if, in fact, he fell or was dropped.

For the Foregoing Reasons, Certiorari Should Be Granted

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

Opinion Below

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

No. 43, 1968

JOSEPH F. FILLIBEN, JR.,

Plaintiff Below, Appellant,

v.

JOSEPH BEN JACKSON, JR.,

Defendant Below, Appellee.

October 25, 1968

WOLCOTT, Chief Justice; CAREY and HERRMANN, JJ., sitting.

Upon appeal from the Superior Court. Reversed and remanded.

Harold Leshem, of Booker, Leshem, Green & Shaffer, Wilmington, for plaintiff below, appellant.

Louis L. Redding, Wilmington, for defendant below, appellee.

CAREY, Justice:

The appellant, Joseph F. Filliben, Jr., brought suit in Superior Court against the appellee, Joseph Ben Jackson, Jr., seeking damages for an alleged defamation. After plaintiff's case in chief was completed, the trial Court di-

rected a verdict in favor of the defendant. It is this ruling which is now questioned.

The appellant, who was a police officer, alleged in his complaint that the appellee maliciously made formal charges against him to the United States Attorney, knowing them to be false. According to the complaint, the alleged untrue charges accused him of "police brutality." At the trial, the appellee admitted that he did have a conversation with the Federal District Attorney, but the record does not disclose precisely what statements were then made by the appellee. There was introduced into evidence, however, a letter written by appellee to Joseph Errigo, who was at the time Commissioner of Public Safety for the City of Wilmington. It was also shown that a copy of that letter was delivered to the Federal Bureau of Investigation. This letter, admitted into evidence *without objection,* constituted the basis of the complaint.

The motion for directed verdict was based on the ground that there was a fatal variance in that there was no proof of any defamatory statement made to the United States Attorney as alleged in the complaint. The Court's ruling was based solely upon that ground. Appellant argues that the ruling was incorrect because, when the letter was admitted into evidence without objection, the pleadings were impliedly amended under Superior Court Civil Rule 15(b). We agree with that contention.

Rule 15(b) is precisely the same as the Federal Rule of Civil Procedure bearing the same designation. Under it, failure to object to the admission of testimony is an implied consent to the amendment. 3 Moore's Federal Practice (2nd ed.) 994; *Eisenrod* v. *Utley,* 211 F. 2d 678. Such is the situation in the present case. The evidence showed a publication to the Commissioner of Public Safety (appellant's highest superior) and to the Federal Bureau of Investigation, rather than to the United States District Attorney;

the variance consisted solely in the identity of the persons to whom the charges were made. Direction of the verdict was accordingly unjustified.

Appellee's brief raises for the first time two additional arguments to support his contention that the judgment should be affirmed despite the error mentioned above. Although these contentions have not been passed upon by the Court below, we will rule upon them for the guidance of the trial Judge in the future handling of the case.

The first contention is that the letter written by appellee "is so vague, inconclusive and nebulous that it could not justify a verdict that defendant made a defamatory utterance relating to plaintiff." This proposition, in our opinion, is a matter for the trier of fact. A jury could reasonably find that the letter charges the appellant with the use of excessive and unjustified physical force in arresting the appeellee which, in our opinion, is the equivalent of "police brutality;" indeed, appellant testified that, if the charges had been found to be true, they would have justified his dismissal from the force. We find no merit in this argument.

Secondly, appellee contends that the appellant, as a police sergeant, was a public official within the meaning of *New York Times Company* v. *Sullivan,* 376 U. S. 254, 84 S. Ct. 710, and that there was no showing of malice as defined in that case. Assuming, without deciding, that appellant was a "public officer," we are of the opinion that the issue of malice is a matter for the trier of fact. The appellant denied the truth of the charges; their nature is such that the jury could properly find that appellee actually knew they were false. Such a finding would suffice to demonstrate malice, under the *Sullivan* rule, *supra.* See *Ross* v. *News-Journal Company,* —— Storey ——, 228 A. 2d 531.

The judgment below must be reversed and remanded for further proceedings consistent herewith.

APPENDIX B

Constitutional and Statutory Provisions Involved

18 U.S.C. §241

§241. *Conspiracy against rights of citizens*

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

18 U.S.C. §242

§242. *Deprivation of rights under color of law*

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

28 U.S.C. §1257

§1257. *State courts; appeal; certiorari*

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

42 U.S.C. §1983

§1983. *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. R.S. §1979.

42 U.S.C. §1985

§1985. *Conspiracy to interfere with civil rights—Preventing officer from performing duties*

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties an an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the law;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the law; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. R.S. §1980.

APPENDIX C

Letter from Petitioner to the Police Commissioner

605 S. Heald Street
Wilmington, Delaware
December 5, 1965

Joseph A. Errigo
Commissioner of Police
Department of Public Safety
Public Building
Wilmington, Delaware

Dear Mr. Errigo:

As per your instructions I am submitting this letter to you as an official complaint of abuse by Police.

On Thursday night, December 2, 1965, between 11:30 and midnight, I was a victim of unprovocative abuse by uniformed city policeman. At 8:00 P.M., Thursday, December 2, 1965 I was excused from work at General Motors to attend the funeral of Andrew Smith at Mother A.U.M.P. Church, 819 French Street, to perform the last rites over him in my capacity as High Priest of Royal Arch Masons of Delaware. It was agreed that I would return to work to finish the shift.

Shortly after 11:30 P. M., on the date mentioned above, I was travelling alone in my automobile west on Delaware Avenue. I was attired in a tuxedo because I could change to my work clothes later. As I travelled in a westerly direction there was one automobile in front of me and one directly behind. Upon approaching Adams Street I indicated a left turn with my directional signals. After I made the bend to the right I indicated a left turn approaching

Jackson Street. The car directly behind me started blowing his horn and pulled over to the left across the double lines and drove up as far as my left rear door. Not knowing what his intentions were I was forced to continue turning right to avoid an accident. As I continued on Delaware Avenue and then to Pennsylvania Avenue, the automobile mentioned before was still in front of me in the left lane. The automobile behind me continued to blow the horn and weave across the double lines and then back behind me.

After I passed Harrison Street, I indicated a left turn at the next intersection which would have been Franklin Street. The automobile in front of me in the left lane stopped and I applied my brakes to stop. The automobile behind me again crossed the double lines and stopped and about the same time another automobile approaching on the right stopped directly beside me. Emerging from the automobile in front of me was a uniform policeman and as he came in my direction he was inquiring as to what was the matter. A uniformed policeman emerged from the car on the right and snatched open the front door and almost simultaneously another uniform policeman whom I recognized to be Sgt. Filliben emerged from the car that had been behind me and was now stopped on my left snatched open the left front door and in extremely harsh demanding tones said "Ben get out of the car". I said, "what happened?" Sgt. Filliben then said "Ben get the hell out of the car, dammit". I asked him again what I had done. He then said "Are you going to get out Ben, or do I have to take you out?" The officer on the right, whom I did not recognize told me I had better get out and went around the back of my automobile and as I stood up Sgt. Filliben yoked me around the neck twisting it while the officer that went around the back of my automobile put my hands behind my back and snapped hand cuffs on my wrist causing un-

bearable pain. I was then thrown to the ground. I tried to get up several times but each time I was knocked back down. Sgt. Filliben then told one of the officers to hold me down and he immediately complied by dropping down upon me with his knee. I tried vainly to get up. I asked the officer repeatedly to let me up and loosen the hand cuffs. I told him that the hand cuffs were hurting me. He said "Shut up". I asked him why couldn't I get up. He said, "because I don't want you to."

During this time Sgt. Filliben walked to the south side of Pennsylvania Avenue and said something to a man that was standing there. The man then disappeared. Traffic continued to move but to my knowledge no one stopped.

When Sgt. Filliben returned he said that the wagon was coming. I was then picked up from the ground and the Sgt. said, "Put him in the wagon". I said, "Wait a minute please and will someone please tell me what I have done?" The Sgt. said, "Put him in the wagon". I asked "Why do I have to go in the Patrol Wagon?" Sgt. Filliben at this instant grabbed me and slammed me back down on the ground and said, "Let him stay there until he decides to get up". After a few minutes he asked if I was ready to get up, I asked him to please get me up and loosen the hand cuffs. I was picked up and put into the patrol wagon. I asked the officer in the back with me to loosen the hand cuffs or take them off because the pain was getting worse. He informed me that he did not have a key to fit them. The driver of the patrol wagon then proceeded to answer a call in the vicinity of 6th and Wallaston Streets. There they picked up a woman. After this the driver went past the police station and over 11th Street Bridge to pick up a man. All during the ride I was begging and pleading for relief of the pain on my wrist.

After I was taken into the station the officer who had told me that he didn't have a key to fit the hand cuffs on my wrists, selected one from a bunch of keys in his possession and caused me to bend over with my head almost between my knees. He then unlocked the hand cuffs. My wrists were terribly bruised, particularly the left one.

After a few sighs of relief I asked the officer, commonly known as the turn key what my bail was. He said, "I don't know Ben, I haven't received any charge". Sgt. Filliben then came down the steps and said, "You've got plenty of them. Speeding, Disorderly Conduct, Resisting Arrest, and Assault and Battery on a Police Officer." In amasement I asked, "When did all this happen?" The Sgt. then replied, "That's what you are charged with". He then asked me if I wanted to have the case continued? I told him that I didn't know, but I would like to know what my bail was. He said that it would probably be around $1000.00 and again inquired if I wanted to continue the case. I told him that I didn't know and all I wanted at the time was to get out of there. I asked if I could sign my own "O.R." and was refused instantly. I was told I would have to get someone to bail me out or stay there. I asked if I could use the telephone and the turn key told me "yes". Sgt. Filliben wanted to know who I was going to call, I told him "Junius". He said "who!" "Reynolds! Do you think he will come and get you?" I told him that I thought that he would. He again inquired as to whether I wanted the case continued. Again I told him that I didn't know. I called Reynolds and made the arrangements to be released. I then asked the turn key if I could call General Motors to tell them that I had been detained at Police Headquarters. He gave me permission to do so. I started to make a third call to borrow money to get my automobile that was left at the scene with the motor running and lights on because the Sgt. told

me that it would be impounded but was told to hang up. Sgt. Filliben then asked me again if I was going to have the case continued? I said to him "I really don't know". I have often read and heard of police brutality but had no idea that I would ever experience it." Sgt. Filliben then said, "you're lucky. Ten years ago I would have black jacked you". I said, "What did you say?" I would have black jacked you ten years ago, you're lucky boy." I said, "With hand cuffs on?" He said, "That's right boy you're lucky." He then demanded that I tell him whether or not I was going to have the case continued. I asked him what was the urgency and if he was on day work. He told me he was on 4 to 12. He then said, "I'll tell you what you're going to do". You're going to have this case tomorrow morning and if it is continued I will turn in my stripes. He then went up stairs.

Reynolds came and I was released. I asked Sgt. Sullivan for a permit to release my car and he gave it to me. The next morning while sitting on a bench in the hall of the Public Building reading a newspaper at about 8:40 A. M., Sgt. Filliben approached me and said, "Ben are you going to have this case continued?" I said nothing. He repeated the question and I did not answer him. He then said, "all right boy, I just gave you your last chance" as though to threaten me.

I have always had an excellent relationship with the members of the police department. Many of them know me as a former city official in the capacity of City Auditor. Prior to that office many of them had escorted me to the banks in the city protecting tax money when I was the Deputy Tax Collector.

I am at a complete loss beyond comprehension as to why I was administered such abuse by men who are suppose to be protectors of the citizens of Wilmington.

My cries for "Help" would have been in vain because who would stop to question uniformed police. The officers were each riding in separate cars, none of which were police cars.

I am appealing to you to investigate this incident thoroughly as to why it happened.

Respectfully yours,

/s/ Joseph B. Jackson Jr.
Joseph B. Jackson Jr.